No. 77-654

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 557 F. 2d 971. The opinion of the Federal Trade Commission (excerpts at Pet. App. 35a-57a) is reported at 87 F.T.C. 962, 1047-1073. The initial decision of the administrative law judge is reported at 87 F.T.C. 962, 967-1046.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. A timely petition for rehearing was denied on August 8, 1977. The petition for a writ of certiorari was filed November 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a buyer who knowingly induces and receives a discriminatory price substantially below any competitive offer is shielded from liability under Section 2(f) of the Clayton Act because the seller offering the lower price may have submitted its bid in a good faith effort to meet competition.

2. Whether the burden of going forward with evidence of a cost justification defense shifts to the buyer once a prima facie case has been made (a) that, in comparison with its competitors, the buyer received more favorable prices from a particular seller, and (b) that any differences in service or quantities purchased could not give rise to sufficient savings to justify the price differences.

STATEMENT

Petitioner, The Great Atlantic & Pacific Tea Company, Inc. ("A & P"), seeks review of a decision by the court of appeals affirming an order of the Federal Trade Commission ("Commission"). The order directs A & P to cease and desist from inducing or accepting unlawfully discriminatory prices in the purchase of milk and other dairy products.

1. In late 1964, A & P headquarters advised A & P divisional purchasing officials to investigate possible savings obtainable by switching from brand-label milk (*i.e.*, milk bearing a processor's label) to private-label milk (*i.e.*, milk bearing the retailer' name or brand). A & P then invited Borden, Inc. ("Borden") to submit a private-label offer for the Chicago area, where Borden had served A & P since 1950. (J.A. 1023, 1954-1955, 1144-1145).[1] In

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[1] "J.A." refers to the parties' joint appendix filed in the court below, a copy of which has been lodged with this Court.

August 1965, Borden offered a price on 11 milk and dairy items that would have permitted A & P to realize annual savings of $410,000 if A & P switched wholly to private label and continued to purchase the same volume (J.A. 3337-3369).

A & P also requested bids from other companies. A & P subsequently received an offer from Bowman Dairy ("Bowman") that was lower than Borden's August offer and would have produced annual savings of $737,000 under the same conditions. A & P notified Borden of the existence of a lower competitive offer and gave Borden the opportunity to respond. Declining to specify what Bowman had bid, A & P told Borden only that an improvement of $50,000 in Borden's initial offer would be a "drop in the pocket" and "not even in the ball park" (J.A. 2147-2148).

Borden responded with a proposal that entailed potential annual savings of $820,000. Borden presented this improved offer without allocating the savings to specific products (J.A. 932-933). It informed A & P that the offer was made on a meeting-competition basis. Though the Bowman offer was substantially less favorable (J.A. 3480), A & P told Borden only that its revised offer was "in the ball park" (J.A. 2152).

In response to A & P's request, Borden allocated the $820,000 savings figure among various products in Borden's dairy line. After reviewing the itemized proposal, A & P urged Borden to make further improvements, saying "[s]harpen your pencil a little bit because you are not quite there" (J.A. 2159). Borden interpreted this instruction to mean that its new offer was not quite as low as the competing offer in A & P's hands (J.A. 2159), and consequently reduced its prices somewhat further (J.A. 2158-2159, 2183-2185).

When Borden presented its final bid to A & P, it again warned A & P that the offer was being made on a meeting-competition basis. Borden's representative stated: "This price is given to you by us on the feeling and belief that we are meeting a competitive bid. We know of no other way to justify this. You have to accept it on that basis." The A & P representative replied, "You don't need to worry. I read you loud and clear * * *" (J.A. 1743-1744). The A & P representative admitted that Borden told him on this occasion and in many other conversations that the final bid was based upon "meeting competition" (J.A. 1893-1912).

A & P itself determined that Borden's offer was "substantially better" and "considerably more attractive" than Bowman's (J.A. 1160-1161, 2017-2018, 3485-3486, 4295-4334). In fact, Borden's final offer was lower than Bowman's by an amount representing nearly $83,000 in annual savings (J.A. 3480, 3482).

A & P then requested a letter from Borden stating that Borden's quoted prices were proportionately available to competitors of A & P (J.A. 1894, 1897). Borden's response to A & P stated only that the quoted prices were legal and that Borden would defend them (J.A. 4460). Although A & P's home office executive who reviewed the offer recognized that this letter did not meet A & P's request, he nonetheless approved acceptance of Borden's offer (J.A. 2010).

The Borden-A & P agreement entailed some reduction in services to A & P. Two months after the beginning of the private-label contract with A & P, Borden extended reduced service terms to all its other retail grocery customers in the Chicago area, but granted these

customers only a two percent discount.[2] The amount of the price discount A & P received varied from 6 percent to as high as 22.5 percent (J.A. 937-941, 3678).

The next year, as a result of an increase in labor and container costs, Borden approached A & P to negotiate an increase in its private-label price (J.A. 1391-1394, 4247-4249, 3511, 4086-4094).[3] Although Borden specifically stated that it had passed increased costs on to other customers in the form of higher prices, A & P refused to accept private-label price adjustments. It did accept such increases, however, on Borden-label products (J.A. 1394-1395, 3514, 4020).[4]

Borden made sales of $5 million to $6 million annually on principal dairy items to some 200 stores in A & P's Chicago unit from 1965 until 1972 (J.A. 918, 921).

2. In 1971, the Commission issued a complaint alleging that A & P had induced or received unlawful discriminatory prices from Borden in violation of Section 2(f) of the Clayton Act, 38 Stat. 730, as amended, 15

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[2]A & P asserts (Pet. 4 n. 3) that the private-label contract entailed a marked reduction in Borden's service to A & P as compared to that rendered to competitors. This contention is contrary to the administrative law judge's findings (J.A. 949-950), adopted by the Commission (J.A. 1034, 1045, 1050) and upheld by the court of appeals (Pet. App. 15a, 16a, 29a, 30a). Although there may have been some service differences, these distinctions were minimal and could not have justified the price differentials accorded to A & P.

[3]The A & P-Borden contract on private-label products provided that prices were subject to negotiated change to reflect increased costs such as container and labor costs (J.A. 935).

[4]Only a year later did A & P accept a private-label price increase—slightly more than half of the earlier proposed increase (J.A. 1399, 3550, 3559-3562, 4020, 6456).

U.S.C. 13(f).[5] After a full hearing, the administrative law judge issued an initial decision finding that A & P had violated Section 2(f).

The Commission affirmed the law judge's findings concerning A & P's violation (Pet. App. 39a-55a) and entered a cease and desist order (Pet. App. 55a-57a). Specifically the Commission found: (1) that Borden discriminated in price between A & P and A & P's competitors (J.A. 1030-1033); (2) that A & P knew or should have known that such discriminations existed, were injurious to competition, and could not be justified under any of the defenses in Section 2 of the Act (J.A. 1037); and (3) that the evidence did not support A & P's asserted affirmative defenses, including cost justification and meeting competition (Pet. App. 42a, 55a).

3. The court of appeals unanimously affirmed the Commission's order. The court held that substantial evidence supported the Commission's findings that Borden's prices to A & P were substantially below the prices at which Borden offered and sold milk products to competitors of A & P and that these price discriminations resulted in competitive injury. The court also upheld the Commission's finding that, by virtue of A & P's course of dealing with Borden and its general trade experience and common sense, A & P knew or should have known that it was the beneficiary of an unlawful price discrimination.

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[5]The complaint also included two other counts, neither of which is now at issue. One count alleged that A & P's failure to disclose to Borden that its final offering price was substantially lower than any competitor's price was an unfair and deceptive act and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. (and Supp. V) 45. The other count charged both A & P and Borden with violating Section 5 by combining to stabilize and maintain milk prices. The Commission dismissed both counts.

The court rejected A & P's argument that, because the final Borden bid had been submitted by Borden in an effort to meet a competitor's offer, Borden's possible "meeting competition" defense absolved A & P from violating Section 2(f). The court held that because A & P knew for a fact that the Borden bid "beat the Bowman bid by a good margin" (Pet. App. 19a), it could not assert a "meeting competition" defense to the charge that it knowingly induced and received an unlawful price (Pet. App. 18a-22a). The court also held that the Commission's finding that A & P had not established a cost justification defense was supported by substantial evidence and was in accord with *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61.

ARGUMENT

The petition presents no question warranting review by this Court. The ruling below is correct and conforms with the legislative purpose underlying Section 2(f) of the Clayton Act, as amended.[6] Moreover, the issues involved here have arisen only infrequently, and the decision is consistent with prior decisions of this Court and other courts of appeals.

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[6]A major purpose of the amendments and additions to the Clayton Act embodied in the Robinson-Patman Price Discrimination Act of 1936 was to remedy the economic evils associated with the buying power of large chain stores, including A & P. 79 Cong. Rec. 9078 (1935); 80 Cong. Rec. 8111, 9415 (1936); Federal Trade Commission, *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. (1935). As this Court has observed, the Act was designed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168, cited with approval in *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349.

1. A & P contends (Pet. 10, 14-16) that Section 2(f) can be applied only when a seller has violated Section 2(a), and that a buyer, no matter how culpable in inducing a discriminatory price, cannot violate Section 2(f) if his seller offered the discriminatory price in good faith to meet "an equally low price of a competitor."[7] Acceptance of A & P's argument would lead to the anomalous result that a defense available to the seller only because of his ignorance of the terms of the competitor's offer would also shield the buyer who is fully cognizant of those terms. But, in enacting Section 2(f), Congress demonstrated its intention to prohibit the knowing receipt or inducement of discriminatory price offers, regardless of whether the sellers making such offers believed they were merely meeting competition.

Even if Borden acted completely in good faith,[8] A & P knew that the Borden offer not only met the earlier Bowman proposal, but in fact represented a significant improvement over that proposal. With such knowledge, A & P accepted the Borden offer. A & P thus received a discriminatory price that it knew could not be justified on meeting-competition grounds. Given A & P's awareness

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[7]In such a case, the seller could presumably sustain a Section 2(b) defense to a charge of discriminatory pricing in violation of Section 2(a).

[8]But see Pet. App. 44a, n. 19, where the Commission found that Borden made no effort to seek additional information about the bid it was attempting to meet, and therefore may have been unable to establish a Section 2(b) meeting-competition defense.

As a general matter, the Commission is not required to join the seller in a Section 2(f) proceeding and prove its liability under Section 2(a). See *Automatic Canteen Co., supra*, 346 U.S. at 79.

of the substantial disparity between the two bids[9]—a disparity to which A & P's inducement materially contributed—the Commission and the court of appeals properly determined that a meeting-competition defense was unavailable to A & P.

The court of appeals' ruling that the "meeting competition" defense must be evaluated from the buyer's perspective when the buyer is charged with a Section 2(f) violation closely follows the reasoning in *Kroger Co.* v. *Federal Trade Commission*, 438 F. 2d 1372 (C.A. 6) (Clark, J., sitting by designation), certiorari denied, 404 U.S. 871.[10] There the Sixth Circuit held (438 F. 2d at 1377) that

> the seller's successful defense under § 2(b) cannot exculpate the buyer since [the buyer] knew that the prices offered by [the seller] and received by [the buyer] were not in fact within the defense of section 2(b). To hold otherwise in this case would put a

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[9]Petitioner has offered a table (Pet. 7) designed to show that the competing offers varied only minimally in per unit prices. This comparison is misleading. When the per unit differences are multiplied by the millions of units sold throughout the area embraced by A & P's Chicago Division, the resulting dollar differences are substantial—amounting to around $83,000 annually or approximately 11 percent of the savings offered by Bowman (J.A. 3479-3480). Moreover, as the court of appeals noted, even relatively small price differentials are competitively significant in the sale of a low-price, high-volume item such as milk (Pet. App. 15a).

[10]A & P cites (Pet. 14 n. 10) *Rutledge* v. *Electronic Hose & Rubber Co.*, 327 F. Supp. 1267 (C.D. Cal.), affirmed, 511 F. 2d 668 (C.A. 9), and *Harbor Banana Distributors, Inc.* v. *Federal Trade Commission*, 499 F. 2d 395 (C.A. 5), as implicitly discrediting the court's holding in *Kroger*. But in *Rutledge* no discrimination was shown (327 F. Supp. at 1275, 511 F. 2d at 677) and in *Harbor Banana* the court found that the challenged price did not "beat," but only met, the competitor's offer.

> premium on the buyer's artifice and cunning in inducing discriminatory prices. * * * In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer.[11]

A & P errs in asserting (Pet. 16-17) that the decision below conflicts with other court of appeals' decisions holding that a seller may be protected by a meeting competition defense even if his price does not exactly match a competitor's. Those decisions simply recognize that, as a practical matter, a seller seeking to meet a competitor's undisclosed bid cannot be expected to duplicate that bid in every detail. The proper standard is the one this Court announced in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760:

> Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. * * * [T]he statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

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[11] A & P asserts that *Kroger* is inapposite because it involved a "lying buyer" and the present case does not (Pet. App. 21a). This factual distinction, if present, is irrelevant. The Commission and the court of appeals relied upon *Kroger* for the principle that the meeting-competition defense to a Section 2(f) charge must be viewed from the buyer's perspective as well as the seller's, and that even though a seller has such a defense, a buyer can still be found to have violated Section 2(f). As the court of appeals concluded, "*Kroger* is, therefore, relevant to the present controversy and its sound reasoning must be applied here" (Pet. App. 21a, 41a-42a, 44a-45a).

But this language does not support A & P's position here, where Borden's offer was much more than a marginal improvement on Bowman's (J.A. 1039, 3385-3406, 3484-3498, 4296), and where A & P was fully apprised of the Borden offer's superiority. Under these circumstances, A & P could not successfully maintain a meeting-competition defense.

2. A & P contends (Pet. 17-20) that the Commission and the court of appeals have misinterpreted this Court's decision in *Automatic Canteen* concerning the burden of going forward with evidence on an asserted cost justification defense. The rulings below, however, fully accord with *Automatic Canteen* and do not call for reconsideration or elaboration of the criteria for establishing the non-availability of a cost justification defense in a Section 2(f) proceeding.

A seller who charges different prices may escape liability under Section 2(a) if he can show that the price differentials merely reflect differences in the cost of manufacturing or delivering the quantities involved in sales to different buyers.[12] Section 2(b) provides that, upon proof of a discrimination in price, "the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section."

In *Automatic Canteen*, this Court held that while proof of an anticompetitive price differential alone is enough to shift the burden of introducing evidence of a cost-

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[12]Section 2(a) provides in pertinent part:

> *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

justification defense to a *seller* charged with a violation of Section 2(a) (346 U.S. at 75-76), considerations of fairness require a different evidentiary rule for buyers charged with violating Section 2(f) (*id.* at 80). Unlike a seller, a buyer who has induced or received a discriminatory price does not have ready access to information necessary to establish a cost-justification defense. Therefore, this Court required an additional showing by the Commission before the burden of presenting evidence on cost justification could be shifted to a buyer. The Court defined that additional showing as follows (*ibid.*):

> The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. The showing of knowledge, of course, will depend to some extent on the size of the discrepancy between cost differential and price differential, so that the two questions are not isolated. A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient.

Asserting that the Commission "acknowledged" that there were differences in the way A & P and its competitors were served that produced cost savings, A & P argues (Pet. 17-18) that the Commission did not show

that those savings were insufficient to justify the different prices offered and therefore did not establish a prima facie case under the *Automatic Canteen* test. In fact, however, the Commission did find that the service differences were "often minimal" and in any event did not produce sufficient cost savings to justify the price differentials.[13] The Commission also found that A & P knew or should have known, first, that the methods and quantities of sale in many instances were substantially the same (J.A. 964) and, second, that even where service discrepancies between A & P and its competitors did exist, the significantly lower prices given to A & P could not be cost justified (Pet. App. 48a-52a).[14]

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[13]At the pages cited by A & P (Pet. App. 41a, 48a-49a), the Commission stated:

> In addition, although there were differences in the way A & P and its competitors were served, the distinctions were often minimal * * *.
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> * * * * *
>
> Many competitors were charged a much higher price than A & P for Borden's milk products even though they bought in greater quantities than the individual A & P stores with which they were competing * * *. Although many of these stores received more service than A & P, the service savings to Borden could not in any way justify the price differentials * * *. In addition, even those companies that received limited service paid a higher price than A & P * * *, a price differential that was not justified by the saving of such costs as advertising * * *.

See also Finding 134 (J.A. 963).

[14]As the court of appeals noted, Borden's statement to A & P that the offer could only be justified on a meeting-competition basis, Borden's failure to furnish A & P with a requested letter stating that the prices charged to A & P were available to other buyers, Borden's submission to A & P during negotiations of cost data showing the A & P private-label prices to be either below cost or at a minimal profit level, A & P's own purchases of physically identical products under private label and the Borden label at substantially different prices, A & P's acceptance of later cost increases in the price of Borden label but not private-label products, and A & P's general trade experience, all demonstrated that A & P knew or should have known that the price differences could not be cost justified (Pet. App. 10a, 16a).

Under *Automatic Canteen*, the burden then shifted to A & P to come forward with evidence to rebut the prima facie showing of knowledge that the price differentials could not be cost justified. A & P failed to do so (Pet. App. 53a-54a). This factual determination by the Commission was upheld by the court of appeals (Pet. App. 28a-30a) and does not merit review by this Court.[15]

A & P further contends (Pet. 18 n. 14) that the court below erred in failing to require the Commission to make an independent finding that in fact the price differentials lacked cost justification. The point is academic, however, because the Commission *did* find that the differences were not cost justified. The Commission adopted the law judge's finding that the price discrimination in favor of Borden did not reflect differences in the cost of manufacture, sale or delivery to A & P (J.A. 949-950, 1023).[16]

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[15]A & P submitted *post litem* cost justification studies in an attempt to demonstrate that, quite apart from what it knew at the time it received the favorable prices, the price differences were in fact cost justified. The Commission affirmed the administrative law judge's findings that the studies were inadequate and defective. The Commission found the studies so flawed that "we would not find them persuasive under any reasonable standard" (Pet. App. 54a). The Commission observed (Pet. App. 55a) that it

> would be willing to lower the standard if it was demonstrated that the buyer could not obtain necessary records from the seller to undertake the study. * * * A & P alleges that hostility existed between Borden and itself * * * but does not confirm that these "inherent conflicts" prevented it from obtaining records from Borden. In fact, the record shows that A & P was able to get the documents it needed.

Thus, contrary to A & P's suggestion (Pet. 20), the Commission did not insist upon an "impossible" standard for A & P's attempted cost justification. The court of appeals found that the Commission's rejection of the studies was fully justified (Pet. App. 23a-24a).

[16]The court of appeals apparently overlooked this finding in stating that "§2(f) liability, therefore, has been arrived at without a square

3. The underlying theme of A & P's petition (see Pet. 9-14) is that the result below will stifle robust negotiation. To the extent that the outcome of this case may limit larger buyers' bargaining power in the special circumstances presented here, A & P's real complaint is not with the decision below but with the Act itself, which was specifically intended to impose limits on the exercise of such bargaining power. Changes in the balance struck by the Act should be sought not from the courts but from Congress, which has evinced a continuing interest in the administration of the Robinson-Patman Act. See, *e.g.*, Report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the House Committee on Small Business, *Recent Efforts to Amend or Repeal the Robinson-Patman Act,* H.R. Rep. No. 94-1738, 94th Cong., 2d Sess. (Committee Print 1976).

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holding as to the factual absence of cost justification" (Pet. App. 24a-25a). The oversight is harmless, however, in view of the fact that, as the court correctly noted, *Automatic Canteen* does not impose upon the Commission the burden of affirmatively proving the absence of cost justification (Pet. App. 25a-26a). See 346 U.S. at 80. Accord, *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (C.A. 9), reversed in part on other grounds, 390 U.S. 341.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

DOJ-1978-02